

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

THE CITY OF HUNTINGTON,	x	
	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION
	:	No. 3:17-01362
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et. al.,	:	
	:	
Defendants.	:	
	:	
	:	
	x	
CABELL COUNTY COMMISSION,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION
	:	No. 3:17-01665
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et. al.,	:	
	:	
Defendants.	:	
	:	
	:	
	x	

STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. FABER,
SENIOR UNITED STATES DISTRICT JUDGE,
JANUARY 27, 2020

APPEARANCES:

For the Plaintiff:
Cabell County
Commission

PAUL T. FARRELL, JR., ESQ.
Greene Ketchum Farrell Bailey & Tweel
P. O. Box 2389
Huntington, WV 25724

ANTHONY J. MAJESTRO, ESQ.
Powell & Majestro
Suite P-1200
405 Capitol Street
Charleston, WV 25301

APPEARANCES CONTINUED:

For the Plaintiff: **MICHAEL A. WOELFEL, ESQ.**
Cabell County Woelfel & Woelfel
Commission 801 Eighth Street
Huntington, WV 25701

For the Plaintiff: **ANNE MCGINNESS KEARSE, ESQ.**
City of Huntington Motley Rice LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

CHARLES R. WEBB, ESQ.
The Webb Law Center
716 Lee Street
Charleston, WV 25301

For the Defendant: **ENU MAINIGI, ESQ.**
Cardinal Health **SUZANNE SALGADO, ESQ.**
Williams & Connolly
725 Twelfth Street, NW
Washington, DC 20005

STEVEN R. RUBY, ESQ.
Bailey & Glasser
209 Capitol Street
Charleston, WV 25301-1386

For the Defendant: **MARK H. LYNCH, ESQ.**
McKesson Covington & Burling
850 10th Street
Washington, DC 20001

JEFFREY M. WAKEFIELD, ESQ.
Flaherty Sensabagh & Bonasso
P. O. Box 3843
Charleston, WV 25338-3843

APPEARANCES CONTINUED:

For the Defendant: **ROBERT A. NICHOLAS, ESQ.**
AmerisourceBergen **JOSEPH J. MAHADY, ESQ.**
Drug Corporation Reed Smith
Three Logan Square, Suite 3100
1717 Arch Street
Philadelphia, PA 19103

GRETCHEN M. CALLAS, ESQ.
Jackson Kelly
P. O. Box 553
Charleston, WV 25322

Proceedings recorded by mechanical stenography,
transcript produced by computer.

CATHERINE SCHUTTE-STANT, RDR, CRR,
Federal Official Court Reporter
300 Virginia Street, East, Room 6009
Charleston, WV 25301

STATUS CONFERENCE

1 P-R-O-C-E-E-D-I-N-G-S 2:34 p.m.

2 Had before The Honorable David A. Faber, Senior
3 United States District Judge, United States District Court
4 for the Southern District of West Virginia, at Charleston,
5 on January 27, 2020, as follows:

6 THE CLERK: All rise. This Court is now in
7 session. Please be seated and come to order.

8 THE COURT: Before the Court this afternoon is the
9 case of *The City of Huntington and Cabell County Commission*
10 *against AmerisourceBergen, Cardinal Health, and McKesson*
11 *Corporation*. There are two consolidated cases: Civil
12 Action Numbers 3:17-01362 and 3:17-01665.

13 And I'll ask the attorneys to note their appearances on
14 the record, please.

15 MR. FARRELL: Paul Farrell Jr. on behalf of the
16 plaintiffs. And the MDL from Cleveland, we say, hello, and
17 we're glad to be back. Before I let my Brethren and sisters
18 introduce themselves, I do want to note from the Cabell
19 County Commission, we do have with us today Commissioner
20 Kelli Sobonya and County Administrator Beth Thompson.

21 THE COURT: All right. Glad to have you.

22 MR. MAJESTRO: Thank you, Your Honor. Also glad
23 to be back. Anthony Majestro on behalf of Cabell County.

24 MS. KEARSE: Your Honor, Anne Kearse, on behalf of
25 The City of Huntington. And Mayor Stephen Williams is here

STATUS CONFERENCE

1 with us as well.

2 THE COURT: Thank you.

3 MR. WEBB: Your Honor, Charles Rusty Webb
4 representing the City of Huntington.

5 MS. Mainigi: Your Honor, good afternoon.
6 Enu Mainigi from Williams & Connolly on behalf of Cardinal
7 Health.

8 THE COURT: All right.

9 MR. LYNCH: Good afternoon, Your Honor. Mark
10 Lynch from Covington & Burling on behalf of McKesson.

11 MR. NICHOLAS: Good afternoon, Your Honor. I'm
12 Robert Nicholas from Reed Smith. I represent
13 AmerisourceBergen.

14 THE COURT: All right.

15 MR. MAHADY: Good afternoon, Your Honor. Joseph
16 Mahady on behalf AmerisourceBergen.

17 MR. WOELFEL: Your Honor, Mike Woelfel on behalf
18 of Cabell County Commission.

19 MR. WAKEFIELD: Good afternoon, Your Honor.
20 Jeffrey Wakefield appearing on behalf of McKesson.

21 MS. CALLAS: Your Honor, Gretchen Callas with the
22 law firm of Jackson Kelly for AmerisourceBergen.

23 MS. SALGADO: Suzanne Salgado with Williams &
24 Connolly on behalf of Cardinal Health.

25 MR. RUBY: And, Your Honor, Steve Ruby with Bailey

STATUS CONFERENCE

1 and Glasser on behalf of Cardinal Health as well.

2 THE COURT: Is that it? All right.

3 The Court set this matter today for a status
4 conference, the cases having been sent back from
5 multidistrict litigation. And I have a number of things on
6 my mind that I'll run through and then I'll hear anything
7 else any of the parties want to offer.

8 The first thing on the plate, is this going to be a
9 bench trial or a jury trial? And it seems to me that we
10 need to decide that, because it's going to have an obvious
11 impact on other things we need to arrange in order to get
12 this case on track to be tried.

13 Mr. Farrell.

14 MR. FARRELL: Yes, Your Honor. As you know, we
15 originally pled a jury trial in our initial pleading. So my
16 reading of rule 39(a) requires it to be by stipulation. So
17 we've asked -- the plaintiffs, both The City of Huntington
18 and Cabell County Commission, are willing to stipulate to a
19 bench trial, and we're awaiting to hear from our brothers
20 and sisters from the other side.

21 THE COURT: Okay. What say the defendants?

22 MS. MAINIGI: Your Honor, the defendants are,
23 candidly, still conferring about this issue. We are hoping
24 to take the opportunity with Your Honor today to understand
25 better what Your Honor was thinking as to how discovery and

STATUS CONFERENCE

1 a trial would be run, and then take that back to our clients
2 and then come back to the Court, if that is possible.

3 THE COURT: Well, we can pursue these other
4 issues, but it seems to me that a lot of -- a lot of it is
5 going to depend on what the defendants have decided to do,
6 whether to -- whether to waive a jury or not. It's up to
7 you, of course. But a bench trial would give me a lot more
8 control over the course of the trial and we could work in
9 some downtime that I wouldn't want to put into the schedule
10 if we had a jury, that would inconvenience the jury. So
11 that's just my thinking on that.

12 MS. MAINIGI: Your Honor, what I would say just
13 for our working purposes then today, as we stated in our
14 papers, right now, I think we should plan -- we're certainly
15 open to continuing to think about a bench trial -- but right
16 now, I think we should plan to proceed as if it will be a
17 jury trial.

18 THE COURT: Okay. Fair enough. If it's a jury
19 trial, that certainly is going to make the plaintiffs'
20 proposed schedule unworkable, it seems to me.

21 MR. FARRELL: Judge, under Rule 39, there is a
22 different course of events. And so it seems to us, in my
23 experience in this MDL matter, is that if a decision is not
24 imperative, then it is imperative not to make a decision.
25 The old Chinese Proverb.

STATUS CONFERENCE

1 So what I would suggest is that we set some type of
2 timeframe to hear from the defendants on an ultimate
3 decision. And a carrot that I will put out is that both the
4 city and the county have conferred and that we -- we are
5 willing to stipulate to the removal of those aspects of the
6 case that give rise to a jury trial, and then it's this
7 Court's decision on whether or not it's a bench trial or
8 not.

9 THE COURT: Now, what are you talking about there,
10 Mr. Farrell? I'm not sure I understand what you're --

11 MR. FARRELL: Well, I have with me here Mr. Tony
12 Majestro, who is the smart one and tells me what I can and
13 can't get away with. My understanding is that if we
14 stipulate to the removal of punitive damages, then that puts
15 this case squarely in your lap.

16 THE COURT: Do you agree with that?

17 MR. LYNCH: Mark Lynch, Your Honor, on behalf of
18 McKesson. We do not agree with that. The claims to which a
19 jury trial rights attach, that goes back to the Court of
20 West Minister, in fact. If we need to brief that, we'd be
21 happy to.

22 And I would say, Your Honor, as Ms. Mainigi said, we
23 are not at this time prepared to waive our right to a jury
24 trial. Further down the road, as the case takes some shape,
25 after we get discovery -- maybe at the end of discovery, we

STATUS CONFERENCE

1 can see where we stand.

2 THE COURT: Well, I think we need to know the
3 answer before that, because it's going -- it seems to me
4 that the course of discovery in the case is going to be
5 impacted by what type of a trial it is.

6 MR. LYNCH: Well, in that case, at this point, as
7 Ms. Mainigi said, we have to assume it's going to be a jury
8 trial.

9 THE COURT: Okay. Well, what if I give you a time
10 deadline to change your mind?

11 MS. MAINIGI: That's fine, Your Honor.

12 MR. LYNCH: I do think, though, that deadline has
13 to allow for us to see some of the scope of the case through
14 the discovery.

15 THE COURT: Well --

16 MR. MAJESTRO: Your Honor, with the concession the
17 plaintiffs are willing to make, we really do believe that
18 there -- you don't get a jury trial with every claim you
19 bring. We believe we have carved this case down to the
20 point where it's an equitable action seeking abatement to
21 which there is no right to a jury trial.

22 My suggestion is, in addition to going on dealing with
23 the other things we can, is that we brief that issue.

24 THE COURT: How do you turn your case into a --
25 into an equitable -- your remedy into an equitable remedy

STATUS CONFERENCE

1 that that waives the jury trial? Is this a damage action?
2 If it's a damage action, it's not an equitable action.

3 MR. MAJESTRO: It's not an equitable action. It's
4 action seeking abatement. And that's what they did in
5 Oklahoma. That's one of the things we talked about doing in
6 Cleveland, which we never got to that point, but there is
7 case law that would support that those are equitable actions
8 to be tried by the Court.

9 THE COURT: Was that the theory that the Oklahoma
10 Judge denied -- denied a jury trial?

11 MR. MAJESTRO: Yes, sir.

12 THE COURT: What do you say about that, Mr. Lynch?

13 MR. LYNCH: That was one of the most primary
14 errors made by the judge in the Oklahoma case. And they've
15 already admitted a list of issues to raise on appeal, and
16 that's up at the top of the list.

17 THE COURT: So you're saying it's not an equitable
18 remedy; it's a damage action?

19 MR. LYNCH: It's a tort. And the existence of the
20 nuisance is something to be found by a jury. And if Mr.
21 Majestro wants to brief it, we'd be happy to do that.

22 MR. MAJESTRO: We can get you a brief in a week,
23 Your Honor.

24 THE COURT: Well, I think I want to see some
25 briefs on that issue. And my reliable law clerk gave me the

STATUS CONFERENCE

1 nod and the wink that she wants to see what you can put on
2 paper.

3 How soon? A week?

4 MR. MAJESTRO: A week, Your Honor.

5 THE COURT: How much time -- can you reply in a
6 week?

7 MR. LYNCH: Could we have 10 days? We have to get
8 everybody together and agree. 10 days would be fine if we
9 could have that, Your Honor.

10 THE COURT: You want 10 days, Mr. Farrell?

11 MR. FARRELL: Judge, in case I wasn't blunt enough
12 in the position statement that we submitted --

13 THE COURT: Well, I understand perfectly your
14 argument, that you want this case to move and get to trial,
15 and I understand the reasons.

16 MR. FARRELL: So I would suggest concomitant
17 briefs at the same time. We can have ours by the end of the
18 week. If they need a little extra time to caucus -- but,
19 Judge, we are on the clock. And I'm trying to do something
20 transformative here.

21 THE COURT: I'll ask for briefs from both sides in
22 10 days.

23 MR. LYNCH: Thank you, Your Honor.

24 THE COURT: On the issue of whether this is an
25 equitable, a case -- suit in equity or an action of law.

STATUS CONFERENCE

1 Now, in my conversation with Judge Polster, he led me
2 to believe that this case was almost ready to go to trial;
3 that he had ruled on a lot of the major issues; he had the
4 Daubert hearings, and the only thing left was discovery on
5 what he called local discovery.

6 The parties agree with that?

7 MS. MAINIGI: Your Honor, we certainly agree local
8 discovery needs to be done. We may differ, with all due
9 respect to Judge Polster, in terms of the scope of that.
10 The discovery that was done in Cleveland, as Your Honor can
11 imagine, was somewhat one-sided as it applies to this case.
12 So as it relates to the defendants that are here, we were
13 obviously defendants there, we have, you know, essentially
14 the same discovery to offer, the same deponents, with
15 perhaps some slight variation. So a tremendous amount of
16 discovery was already conducted as it relates to our
17 clients. However, on the other side, the discovery that was
18 obviously conducted of the plaintiffs was discovery limited
19 to the two counties that were involved in the litigation,
20 Cuyahoga and Summit County.

21 Here, hardly any of that discovery has been done. And
22 that remains to be done. And if Your Honor would like
23 specifics, I'm sure some of my colleagues can share the
24 specifics.

25 THE COURT: Well, you asked for 18 months, and I'm

STATUS CONFERENCE

1 not inclined to give you anything close to 18 months in view
2 of the fact that this case has been pending for three years
3 really. And I just got it back with instructions to --
4 well, not instructions -- but with an urge to get it moving.

5 MS. MAINIGI: Your Honor, if I could make a few
6 points in response to that?

7 One, we've hardly gotten any discovery from the
8 plaintiffs. So there is a tremendous amount of discovery
9 that I think it would be worth highlighting to Your Honor if
10 you have some indulgence of us in terms of listening to
11 that.

12 Second, I'd like Your Honor to consider also the
13 difference between this case and the case that was in --
14 where we picked a jury in Cleveland. There were multiple
15 other defendants in that case.

16 Here, the three defendants that are sitting here at
17 this table have been artificially severed out. That does
18 not mean all the other defendants that still exist in the
19 litigation are irrelevant. And, in fact, discovery from
20 those defendants is very key to this case, because, Your
21 Honor, as pled, the complaint in this case, essentially, a
22 big chunk of the complaint in this case essentially alleges
23 that the cause of this -- or a significant cause of the
24 opioid crisis was the marketing by pharmaceutical companies,
25 of which you don't have any at this table.

STATUS CONFERENCE

1 So I think that there is going to be a tremendous
2 amount of necessary third-party discovery as it relates not
3 just to the pharmaceutical companies, but, also, Your Honor,
4 as it relates to entities such as the Board of Pharmacy and
5 the local West Virginia entities.

6 By contrast, the DEA discovery has certainly been done
7 and completed in significant part. But there is local
8 discovery that still very much remains. And then, of
9 course, we've got several issues, as we've highlighted to
10 Your Honor, that need to be briefed even prior to summary
11 judgment briefing which would need to take place.

12 THE COURT: Well, one of the concerns -- and maybe
13 you're getting to that -- that I have is the nonparty fault.
14 And it seems to me that has got -- the discovery on that has
15 got to be limited, because it could go on forever, if you
16 get to the point where you are going to look at the doctors
17 who prescribed these medications and things like that.

18 So can you give me an idea of where you want to go with
19 that?

20 MS. MAINIGI: Your Honor, with respect to nonparty
21 fault, I mean, certainly we would have discovery related to
22 the manufacturers, discovery related to the pharmacies. I
23 think that there would be prescriber discovery that would
24 take place. And I'll ask any of my colleagues if they have
25 any other specifics to offer, but those -- those, I think,

STATUS CONFERENCE

1 are some of the big categories, Your Honor, that just
2 realistically need to take place. And Your Honor is
3 absolutely correct, that that is another distinction between
4 here, just given the nature of the nonparty fault statute
5 versus Cleveland.

6 Just as a frame of reference, Your Honor, I believe
7 that -- I may be off slightly in my numbers -- but I believe
8 in Cleveland, the Track 1 plaintiffs produced 99 witnesses
9 for deposition. They were all Ohio specific witnesses.

10 I'm not suggesting that's how many need to occur here.
11 But that certainly was the magnitude of the county witnesses
12 and other witnesses related to the county that took place
13 with Judge Polster's consent and the Special Master's
14 consent in Cleveland.

15 None of that discovery, obviously, Your Honor, since it
16 was county specific would have applicability here.

17 MR. NICHOLAS: Your Honor, could I just -- so we
18 don't lose track of one thing -- this is Robert Nicholas for
19 AmerisourceBergen -- and that is, the scope of the discovery
20 that is being pointed out by the plaintiffs in our
21 direction, at least, at the moment.

22 First of all, the plaintiffs are seeking discovery not
23 just pertaining to the State of West Virginia, but also to
24 Kentucky, and Ohio. They are seeking files, they are
25 seeking data, they are seeking a lot of documentation.

STATUS CONFERENCE

1 That's something that needs to be taken into account.

2 As recently as last Thursday --

3 THE COURT: Is that relevant? Do you agree it's
4 relevant?

5 MR. NICHOLAS: I'm not suggesting it is. But the
6 plaintiffs have taken the position that it is. That's a
7 fight. So right now, that's out there.

8 The other thing -- and I'll just speak for the
9 communications between the plaintiffs' side of things and
10 our -- us, AmerisourceBergen.

11 Last Thursday, we had a call with plaintiffs' counsel,
12 not Mr. Farrell, but his colleagues from a different firm,
13 and they are currently seeking, they want -- and this is not
14 a definitive list on their part, but they are asking for
15 nine depositions. Almost all of the people that they are
16 seeking depositions of from my clients have not been deposed
17 in this multidistrict litigation, so it's not duplicative,
18 or there is nothing to use from that here. That's nine.

19 They've identified 41 custodians whose files they would
20 like us to cull through and produce. We have not completed
21 the process, the negotiation process of search terms to be
22 applied to those custodians. And so -- well, yes, we would
23 actually like to see some of this discovery narrowing, you
24 know, that is directed towards us. The reality is that is
25 what we are facing right now. And I actually wouldn't want

STATUS CONFERENCE

1 the Court to have the impression that this is a one-way --
2 it's just discovery we need from the other side. They are
3 looking for a lot of discovery from us. So that has to be
4 taken into account when a schedule is set.

5 Thank you, Your Honor.

6 THE COURT: You want to respond to that, Mr.
7 Farrell, and, Mr. Majestro?

8 MR. FARRELL: Yes. For two years, we have been in
9 the MDL and there is always going to be another reason why a
10 case can't go to trial. Cuyahoga and Summit County have
11 1.8 million people. Cabell County has 94,000. We've
12 already produced a tremendous amount of documents. We think
13 that your magistrate can handle any discovery issues that
14 remain outstanding. The fact of the matter is that this
15 case is, if you -- it may take you a little while, but if
16 you follow the docket of this voluminous case, Peter Mougey
17 and Tony Majestro, and myself, we have a data-driven case
18 that is going to demonstrate that there were 10 million
19 pills of opium sold into Cabell County, West Virginia, every
20 year for 10 years.

21 The numbers in this case will be completely driving
22 every other factor. So we also are alleging joint
23 liability. So it doesn't matter how many fingers they
24 point. They can point a thousand fingers. Under joint
25 liability, if they are held to cause or contribute, they are

STATUS CONFERENCE

1 going to be responsible for it.

2 So all of these things are issues that we've been
3 arguing about and for the past two years. There is nothing
4 new that's been said today.

5 We just need a trial date. We need closure. We need
6 to get to the end of the road. And the plaintiffs are ready
7 and willing to put their case up.

8 (Pause.)

9 THE COURT: How much time do you need to complete
10 what we are referring to as the local discovery that you
11 want to get?

12 MR. NICHOLAS: Your Honor, what I was saying was
13 they are asking for discovery from the individual
14 defendants: Cardinal, McKesson, and AmerisourceBergen.

15 THE COURT: I want to get a handle on what -- I
16 understand that, but they are asking for discovery.

17 MR. FARRELL: Judge, let me see if I can answer
18 your question. I would think that in the next 30 days that
19 all of the plaintiffs' discovery to the defendants could be
20 over. The reason I say that is that this case has distilled
21 down into very discrete subparts. If you read Judge
22 Polster's summary judgment motion, which he granted the
23 plaintiffs' summary judgment on the law of distribution,
24 what we have are elements of our case.

25 We served in discovery back in October, I believe,

STATUS CONFERENCE

1 eleven discovery requests. If we get the answer to those
2 eleven discovery requests, then we are prepared to go to
3 trial. Most of that has been completed. There are some
4 components of those discovery requests that are not.

5 THE COURT: How does that square with the proposed
6 schedule that you submitted that you -- if I understood
7 correctly, you wanted to do ongoing discovery while you did
8 parts of the trial?

9 MR. FARRELL: So if this were a law school trial
10 ad class, I would describe it as certain case -- certain
11 aspects of this case are in the can. We have what -- I
12 believe as I outlined in my letter, we can put on an entire
13 week, starting tomorrow, on ARCOS data, that there is no
14 more discovery that will be done. We can put on a week's
15 worth of DEA video testimony that will put in elements of
16 the case that no more work needs to be done.

17 We can put in substantial aspects of our liability case
18 against each of The Big 3, and no more discovery needs to be
19 done.

20 The only thing that I need from them is a list of the
21 suspicious orders that they are prepared to stand up in
22 front of you, and a jury, and God, himself, and say these
23 are their orders we reported, and two, the due diligence
24 files.

25 So by way of example, AmerisourceBergen has answered

STATUS CONFERENCE

1 discovery on January 2, 2020. If they live by that
2 document, they are probably done.

3 Now, are there other aspects of the case that we would
4 like to build and to pursue? Sure. But to get a trial date
5 in this case, I'll shut down discovery today. That's how
6 important it is for us.

7 THE COURT: You are telling me 30 days, then?

8 MR. FARRELL: 30 days.

9 THE COURT: Okay. How much time will you need to
10 finish what you think you need? And the 18 months is not
11 going to get it. I mean --

12 MS. MAINIGI: Your Honor, it's not -- and then
13 I'll let my colleague, Mr. Lynch, jump in -- it is not -- in
14 our mind, it is not finished at discovery; it begins at
15 discovery, unfortunately, because we do not have hardly any
16 of the discovery that we need for the two entities that are
17 suing us. None of the discovery that we've received from
18 Cabell County and from -- excuse me -- none of the discovery
19 that we've received from Cuyahoga County and Summit, which
20 not only were those 99 depositions, but they produced more
21 than 15 million documents. Cabell and Huntington, so far,
22 have produced 62,000.

23 So we are not trying to go overboard, Your Honor, but
24 we -- just because Mr. Farrell has decided he's going to
25 prosecute a data-driven case, that does not mean that he is

STATUS CONFERENCE

1 entitled to drive our defense of the case, Your Honor.

2 So I understand Your Honor's position. And certainly
3 we can do our best to pull back from the estimate that we
4 provided of 18 months, but I don't think that we were making
5 that number up. We were using as the estimate the one guide
6 that we have, which is the Cleveland matter.

7 MR. LYNCH: I would add, Your Honor, Mr. Farrell
8 made the point that there are 1.9 million people who live in
9 the two counties in Cleveland, and 94,000 people in Cabell
10 County. I think I got those numbers, more or less, right.

11 True enough. Point taken. But the opioid epidemic was
12 far more severe -- I don't think Mr. Farrell is going to
13 dispute this -- far more severe in Cabell and Huntington
14 than it was in Cuyahoga.

15 MR. FARRELL: Stipulated.

16 THE COURT: Yes. I read dreamland, Mr. Lynch. I
17 agree with you.

18 MR. LYNCH: Now, another point here, it is not
19 merely -- not merely a discovery issue, but under the
20 relatively recently enacted statute on apportionment of
21 responsibility, that's going to affect how the trial is
22 conducted. So there are a lot of entities, both public and
23 private, to share responsibility for the opioid crisis. We
24 need to build that story. The fact-finder needs to be able
25 to apportion responsibility.

STATUS CONFERENCE

1 Now, that's going to take some time. I think 18
2 months, Your Honor, is not a good number to think in terms
3 of discovery, but it's probably a reasonable number to think
4 of in terms of getting the case ready for trial. I would
5 guess that it's going to take at least six months for Mr.
6 Farrell to produce the documents that we are entitled to.
7 If he can do it sooner, God bless him, and we can move it --

8 THE COURT: He says he can do it within 30 days,
9 and he's shaking his head he can.

10 MR. LYNCH: He knows -- he knows that we have a
11 reasonable request for many more documents than he can
12 produce in 30 days.

13 MR. FARRELL: If I may?

14 THE COURT: Well, I don't think Mr. Lynch is
15 through yet.

16 MR. FARRELL: What I'm suggesting is, if that's
17 the issue that is holding this up, then we can get that
18 resolved immediately.

19 MR. LYNCH: And then after we get the document
20 discovery, we need to take the depositions. And that, I
21 would hazard a guess, could take six months after we get the
22 documents. Now, if we speed up the documents, we can speed
23 up the depositions; we can get to depositions sooner. And
24 then you go, you go into motions, you go into expert
25 discovery, you go into Daubert hearings. And that's how we

STATUS CONFERENCE

1 got to 18 months, thinking of 18 months to get the case
2 ready for trial.

3 THE COURT: I thought Judge Polster took care of
4 all the Daubert issues?

5 MR. LYNCH: I'm glad you raised that because I
6 want to get back to that. Judge Polster's rulings are not
7 the law of this case. These are separate cases. It's a
8 pretty fundamental concept or precept of multidistrict
9 litigation that decisions that a transferee judge makes in
10 bellwether cases do not become the law of the case in the
11 other cases. They are independent cases.

12 So I think it was a little overoptimism on his part
13 that he told you these cases are all ready to go to trial.

14 And Mr. Farrell -- I was going to get to this anyway,
15 but Mr. Farrell's mission has a list of matters that are
16 covered by law in the case. We disagree with that
17 profoundly. That is another issue that we are preparing to
18 brief if we need to.

19 But those rulings of Judge Polster in the bellwether
20 cases are not law of this case.

21 MS. MAINIGI: Your Honor, may I add just one
22 additional point?

23 THE COURT: Sure.

24 MS. MAINIGI: Coming back to Cuyahoga and Summit
25 as somewhat of a frame of reference, the two counties in

STATUS CONFERENCE

1 that matter missed their nine-month deadline for production
2 of documents.

3 THE COURT: Well, they got thrown out of the case,
4 too, didn't they?

5 MS. MAINIGI: Cleveland did, Your Honor, but the
6 other counties also missed the nine-month deadline. You're
7 absolutely right, Your Honor, that Cleveland got thrown out
8 for document deficiency. But the other counties both missed
9 the nine-month deadline.

10 Mr. Farrell, on January 23rd, 2019, in a discovery
11 teleconference, told Special Master Cohen, our discovery
12 Special Master, that document production here in Cabell and
13 Huntington would be more laborious than Track 1 counties,
14 because Huntington and Cabell are not digitized and
15 automated in terms of the retrieval of information like
16 Cuyahoga and Summit were.

17 Now, I do think --

18 THE COURT: Well, that's Mr. Farrell's problem,
19 isn't it?

20 MS. MAINIGI: It is Mr. Farrell's problem, but
21 what we are trying to do, Your Honor, is to be realistic
22 about what happened before. It is Mr. Farrell's problem.
23 We don't think in any universe Mr. Farrell can actually
24 produce the documents that we are entitled to from the
25 jurisdictions in 30 days. If he can, then we'll stand

STATUS CONFERENCE

1 corrected, but we do not think that could possibly be the
2 case.

3 THE COURT: Well, he says he can. Shouldn't I
4 give him an opportunity to raise his credibility with the
5 Court by doing it?

6 MR. FARRELL: That was January 23, 2019. Since
7 that time, the Commissioner Kelli Sobonya has thrown my
8 staff out of the county commission building almost on a
9 weekly basis as we've photocopied, digitized, and gathered
10 every single document in possession of the county
11 commission. So not only am I prepared to say in 30 days, it
12 could be I could certify it by the end of the week that the
13 documents in our possession have been turned over.

14 Now, to be clear, that doesn't mean those are all the
15 documents that defendants will need. But from the purpose
16 of the county commission, standing here -- sitting here, and
17 what documents they have, I'm pretty comfortable we can
18 disclose everything. The city is here as well. The mayor
19 is here. He's had people in his office for the past six
20 months, anticipating this day, hoping this day would come.
21 I would say that by the end of the week, they could give you
22 an idea as to whether or not the documents we have have been
23 produced.

24 So, like I said, if this is a document production
25 issue, I can take care of that.

STATUS CONFERENCE

1 What this really is is a delay of justice.

2 MR. NICHOLAS: Your Honor, just to -- I mean, as
3 of today, the plaintiffs have not agreed on custodians; they
4 haven't agreed on search terms. And that is the very
5 beginning of the discovery process. We are not -- we are
6 not looking for delay for the sake of delay. We are just
7 trying to protect ourselves and make sure that we have the
8 opportunity to obtain the documents that we need to defend
9 ourselves. But until literally this moment, they have
10 not -- they have not agreed even on which custodians they'll
11 agree to, much less the search terms that apply to those
12 custodians.

13 So to hear the concept that they are going to have all
14 of that done in 30 days, is just -- I mean, that's -- that's
15 very, very tough to think is really possible in any world.

16 MS. KEARSE: Your Honor, Anne Kearse with the City
17 of Huntington. And I had the pleasure of actually doing a
18 lot of defense's discovery in Summit and Cuyahoga County. A
19 lot was learned. We go a lot faster and we got ahead of the
20 game. But the search terms -- the search terms have been
21 agreed to. We also have exchanged custodial documents, and
22 custodians that were asked for were people that were either
23 not under our control. We have a meet-and-confer on
24 Wednesday and we hope to finalize those. So we are very,
25 very close to custodians. Search terms are already agreed

STATUS CONFERENCE

1 to.

2 MR. MAJESTRO: Your Honor, I think before we get
3 much further on this, this whole idea of some of these legal
4 issues, you know, I think we probably are going to need to
5 brief the -- the binding nature, whether or not Judge
6 Polster's orders are binding. I would suggest to Your Honor
7 that they are very well reasoned orders, and that even if
8 you aren't bound, which we believe you are, that you would
9 come to the same conclusion and could get there very quickly
10 just by reading them.

11 The second point I want to make is important and on
12 this whole idea of nonparty fault. You know, one of the
13 things I do when I'm not practicing law is I spend a little
14 time at the legislature. And I was there in 2015 when that
15 statute was passed. And one of the things I made sure it
16 had was a retroactivity provision. And that statute
17 specifically says that it applies to causes of actions
18 accruing on or after the effective date.

19 And so the causes of action we are here on today
20 accrued well before 2015 when that statute went into effect.

21 We believe the 2005 Act applies, which does not allow
22 them to create that mess that they are trying to create with
23 respect to joint and several liability. They are joint and
24 severally liable, and we believe that -- that all of this
25 other stuff is just another excuse to try to drag this out

STATUS CONFERENCE

1 and overly complicate what is really a simple case.

2 THE COURT: Well, is that an issue as to which act
3 applies which I'm going to have to decide?

4 MR. LYNCH: I think that is an issue for Your
5 Honor. Actually, Mr. Wakefield might address the local
6 statute.

7 MR. WAKEFIELD: Your Honor, I think it is an issue
8 that is going to have to be addressed. I mean, there have
9 been a couple different issues that have been raised, for
10 example, Mass Litigation Panel, as to preliminary issues
11 that have to be addressed before the case proceeds; the
12 statute of limitations is an issue, standing on public
13 nuisance claims. We believe that those issues should be
14 addressed preliminarily by the Court.

15 MR. MAJESTRO: And again, Your Honor, I think -- I
16 have two points on those, on addressing those issues. You
17 know, I -- the first time I was before you in a long time is
18 when I argued the motions -- against the motions to dismiss.
19 We went back to federal court. Judge Polster set this case,
20 Cabell County, as a motion case. We filed an amended
21 complaint and re-briefed it all. Those motions were pending
22 before Judge Polster. When he said, okay, I'm going to rule
23 on those now; they withdrew them. And so they were so
24 important that they withdraw them.

25 And so Judge Polster said in his order that the

STATUS CONFERENCE

1 transfer court could deal with those issues on summary
2 judgment. And we believe that is the correct way to handle
3 all of these legal issues.

4 But when you get to them, what you are going to find is
5 that in the past two or three years we've been litigating
6 this case, judges all over the country have been resolving
7 these same issues. This whole idea of a public right.
8 Fourteen different state courts and federal courts have
9 ruled they are wrong. The West Virginia courts have twice
10 ruled they are wrong. The West Virginia Supreme Court has
11 twice, last -- most recently, last spring unanimously
12 decided to grant extraordinary rule on this decision.

13 The other legal issues out there, they are going to
14 re-file all their hundreds and thousands of pages of
15 motions, just like they did in Cleveland. But we have
16 gotten to the point where we can brief them quickly, and,
17 and if there aren't rulings that you are bound by, there is
18 plenty of guidance that will allow you to quickly decide
19 these legal issues.

20 MR. LYNCH: Your Honor, the issues that were
21 pending on the motions to dismiss, on Rule 12(b) in the
22 multidistrict case, which were withdrawn, we do not intend
23 to re-file in this case. Not because it's the law in the
24 case, but we don't intend to do that.

25 We think that most of those issues will be resubmitted

STATUS CONFERENCE

1 in the context of a summary judgment motion on the basis of
2 a full record.

3 There are two threshold issues that we think we can
4 move on for judgment quickly without the need for discovery.
5 First would be on the res judicata defense that we have.
6 Each of the defendants here has a settlement with the state
7 of -- with the State of West Virginia. And we claim that
8 that settlement is res judicata on the political
9 subdivisions of West Virginia. We can file a motion for
10 summary judgment on that and it won't require any discovery
11 and we can get that out of the way.

12 We also think we need to file an early motion on the
13 question of the municipality's and county's standing to
14 bring these nuisance cases.

15 Then there is the statute of limitations. We think
16 there is a very robust record on statute of limitations, but
17 that that record will only get better as we take discovery.
18 So we will probably hold off on statute of limitations.

19 So that's our plan for motions. Two quick ones. Other
20 ones wait for summary judgment motions on a full record.

21 MR. MAJESTRO: Your Honor, I point out that all of
22 those motions were the subject of the motions to dismiss
23 that were withdrawn, including the res judicata motion.

24 I'll also point out that motion was also rejected by
25 the state courts in West Virginia. And afterwards, the

STATUS CONFERENCE

1 Attorney General himself, his deputy, who is in charge of
2 this case, has publically taken the position they don't have
3 the authority nor did they try to resolve the city's and
4 county's cases.

5 And in terms of discovery on that, if they are going to
6 continue to raise that argument, they need to produce to us
7 the negotiating history of those settlement agreements.
8 They've refused to do it so far. What little documents we
9 have on that subject show that they asked for those exact
10 releases that they say they got and the Attorney General
11 turned them down.

12 So as a factual matter -- as a legal matter, they are
13 wrong. As a factual matter, they are wrong. Again, it
14 is -- these are -- these are issues -- they are, again, they
15 are issues, legal issues that need to be resolved. We
16 probably would have had a resolution of this issue had they
17 not withdrawn that motion from Judge Polster. We are
18 willing to brief that argument. We'd like you to tell them
19 they've got to give us all of the negotiating history
20 between them and the Attorney General's Office.

21 MR. LYNCH: In fact, there was only one motion
22 before Judge Polster on res judicata and that had been filed
23 by Cardinal. McKesson and ABDC had not yet filed a motion
24 on that issue.

25 It sounds like -- and each settlement is different in

STATUS CONFERENCE

1 some particulars. Now, it sounds like Mr. Majestro is
2 saying that what I thought was going to be a simple motion
3 for summary judgment is going to involve some discovery.

4 MR. MAJESTRO: We'd like the documents. That's
5 all we need. That doesn't overly complicate things.

6 MS. MAINIGI: Your Honor, if I just may add, on
7 the threshold motions issue, I think you've heard some
8 discussion on the res judicata.

9 On the issue of standing, I think that is a very live
10 issue in West Virginia right now. Our position is
11 plaintiffs have standing to pursue a public nuisance claim
12 if, and only if, they enacted an ordinance of general
13 applicability that defines the nuisance. Cabell County did
14 that in January 2017. Our view is they cannot recover for
15 conduct before that date that allegedly created the
16 nuisance.

17 And plaintiffs stood here and told the Court in 2017 at
18 the motion to dismiss hearing that distributors were doing
19 everything right as of that date. So we really do have a
20 disconnect here, Your Honor, between the public nuisance
21 statute and what it requires and what the plaintiffs have
22 actually -- what the plaintiffs actually have in support.
23 And I do think that is a critical issue that Your Honor
24 needs to rule upon before discovery goes full bore.

25 THE COURT: Well, you agree with that, don't you,

STATUS CONFERENCE

1 Mr. Majestro?

2 MR. MAJESTRO: No, Your Honor. And, again, this
3 standing argument was one of the arguments they raised
4 before you the first time we were here. We can brief while
5 -- we can walk them through this at the same time --

6 THE COURT: I was asking you, do you agree it's an
7 issue that needs to be resolved right away?

8 MR. MAJESTRO: It's -- I don't know if I
9 necessarily agree -- if right away means we should stop and
10 wait for it to be resolved; no, I don't agree. This is a --
11 this issue, I mean, they raised this -- these issues in
12 state court, and lost those issues. And, I mean, these
13 are -- they have the right to raise legal issues. In the
14 end, these are simple issues. You can resolve them at the
15 same time we are doing whatever discovery we need to do,
16 whatever, at the same time we are going to prepare for
17 trial.

18 And one of the lessons of this MDL is, if you look at
19 all of those numbers of all of the amounts of work that were
20 done in the short period of time it was done, I have never
21 been involved in a case where the parties have shown their
22 ability to accomplish vast amounts of legal work in -- in
23 times that in my other practice it would have been unheard
24 of. We can get this stuff done. We can get you these legal
25 issues presented to you in a format you can rule on. That's

STATUS CONFERENCE

1 what happened in the MDL. We did all the expert depositions
2 in a month, more or less. I mean, those sorts of things,
3 there are enough bodies in this case to get it done.

4 MR. NICHOLAS: Your Honor, just by way of
5 clarifying the record. From memory, I can think of at least
6 two states -- just so we don't sweep all the states under
7 the same umbrella the way our motions to dismiss this
8 litigation were granted -- one in Connecticut and one in
9 North Dakota on standing or private right of action type of
10 issues.

11 I just don't want the record to sound as if no state
12 has done that, because, in fact, at least two -- those are
13 the two at least coming to mind -- have. And Louisiana and
14 Delaware.

15 (Pause.)

16 THE COURT: Mr. Ruby, you want to say something?

17 MR. RUBY: Your Honor, just one point that the
18 Court should be aware of, and to expand on Ms. Mainigi's
19 point that it's a live issue, the issue of standing in West
20 Virginia. The Mass Litigation Panel, where there is a whole
21 other set, as the Court knows, of state court cases that are
22 pending here in West Virginia, in the last status conference
23 there, Judge Moats, who, of course, is very familiar with
24 the way that West Virginia -- these West Virginia statutes,
25 in particular, interact with complex mass litigation,

STATUS CONFERENCE

1 because the Mass Litigation Panel handles those all the
2 time; he sua sponte raised the issue of standing and whether
3 there is a viable claim at all of public nuisance given the
4 way that these nuisance claims were raised and the
5 applicable West Virginia law.

6 So the parties have briefed -- or the plaintiffs in
7 those cases have briefed that, and they are -- there will be
8 a response from the defendants. But Judge Moats and the
9 panel there thought that that issue of West Virginia law was
10 sufficiently unsettled and sufficiently important that the
11 panel declined to even enter a Case Management Order until
12 the parties could brief that and the panel could make a
13 decision on it. And the same is true, incidentally, of the
14 question of statute of limitations.

15 And in the same hearing back in December, the panel
16 again sua sponte raised the issue of statute of limitations;
17 required the parties to submit briefing on that, which will
18 be submitted next week. And the panel took the same
19 position, that those issues are, number one, sufficiently
20 unsettled, and number two, sufficiently important that it
21 would be premature to even enter a Case Management Order
22 before there can be briefing decided.

23 THE COURT: Okay. I'm going to take a short
24 break, and we'll be in recess for about five minutes.

25 THE CLERK: All rise. This Court stands in

STATUS CONFERENCE

1 recess.

2 (A recess was taken from 3:19 p.m. until 3:30 p.m.)

3 (Proceedings resumed.)

4 THE CLERK: All rise. This Court is in session.
5 Please be seated and come to order.

6 THE COURT: Well, I rarely continue these, but I
7 think we've done about everything we can do today. And I'm
8 a little disappointed we haven't made more progress than we
9 have.

10 But here's what I propose to do: We are going to
11 decide the bench trial motion first, because that's going to
12 impact everything else, it seems to me, of what I do here.

13 So I'll receive the cross motions on the bench trial
14 versus the jury trial issue in 10 days. I don't see any --
15 I haven't heard anything today that should hold up you
16 getting busy with the discovery you need on both sides.

17 The magistrate, I understand, is going to hold a
18 hearing on the pending Motion to Compel right after the
19 conclusion of this hearing. And he's ready to work with you
20 on discovery and get the discovery moving.

21 So my instruction to you is start that with dispatch on
22 both sides.

23 I would like for you to try to submit a proposed Case
24 Management Order to me within two weeks. And I realize
25 that's a tall order, but make an effort to do that. And I'm

STATUS CONFERENCE

1 ready to help you if I can. But make an effort to submit a
2 Case Management Order in two weeks.

3 I'm going to set another status conference for the
4 first week in March, and we'll see where we are at that
5 point and by then the bench trial versus jury trial issue
6 should be resolved.

7 I intend after that status conference to set a trial
8 date in the case, and it won't be anywhere near the 18
9 months the defendants want. I'm going to set the case for
10 trial and work backward from that date based on what it
11 appears to me to be a reasonable date. And I'll look at the
12 status when we have the other conference in March.

13 I think that's about all we can get done today.

14 Does anybody have any problem with that?

15 MR. FARRELL: Judge, can we have one second to
16 confer?

17 THE COURT: Yes.

18 MS. MAINIGI: Your Honor, from the defendants,
19 that's fine with us.

20 (An off-the-record discussion was held between
21 plaintiffs' counsel.)

22 (Pause.)

23 MR. FARRELL: Judge?

24 THE COURT: Yes.

25 MR. FARRELL: What we would ask is that you also

STATUS CONFERENCE

1 allow for us to brief in the absence of punitive damages
2 whether or not the bench has the ability under Rule 39 to
3 make a ruling that this is a nonjury trial.

4 THE COURT: Well, isn't that encompassed in the
5 brief you're going to file in 10 days?

6 MR. FARRELL: Yes.

7 MS. MAINIGI: Yes, Your Honor.

8 THE COURT: Yes.

9 MR. FARRELL: I'm just trying to narrowly identify
10 that, in the absence of a bench trial -- if this is a jury
11 trial, we have a punitive damage claim. The question then
12 we are briefing is whether or not, in the absence of a
13 punitive damage claim, whether the bench has the authority
14 to rule this is a -- under your discretion is a bench trial.

15 THE COURT: Well, that's an issue that you are
16 going to address, isn't it --

17 MS. MAINIGI: Correct, Your Honor.

18 MR. FARRELL: Yes.

19 THE COURT: Okay -- in the briefs I'm going to get
20 in 10 days?

21 MR. FARRELL: Yes, sir.

22 MS. MAINIGI: Yes, Your Honor.

23 THE COURT: All right, anything else?

24 (No response.)

25 THE COURT: Okay.

STATUS CONFERENCE

1 THE CLERK: All rise.

2 THE COURT: I look forward to seeing your work.

3 THE CLERK: This Court stands in recess.

4 (Proceedings concluded at 3:34 p.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF OFFICIAL REPORTER

2
3 I, Catherine Schutte-Stant, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of West Virginia, do hereby
6 certify that, pursuant to Section 753, Title 28, United
7 States Code, the foregoing is a true and correct transcript
8 of the stenographically reported proceedings held in the
9 above-entitled matter and that the transcript page format is
10 in conformance with the regulations of the Judicial
11 Conference of the United States.

12
13 s/Catherine Schutte-Stant, RDR, CRR

14 _____ January 29, 2020

15 Catherine Schutte-Stant, RDR, CRR
16 Federal Official Court Reporter
17
18
19
20
21
22
23
24
25